(1)

90-1085

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALFRED GIUFFRIDA,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Did the Trial Court err in denying Petitioner-Defendant to set aside his plea of guilty pursuant to Rule 11 of the Federal Rules of Criminal Procedure?

2. Did the Trial Court commit prejudicial error by not complying with the spirit and intent of Sections 1B1.3; 5K2.12, and 3B1.1 of the Federal Sentencing Guidelines?

PARTIES IN THE COURT BELOW

The Petitioner, Alfred Giuffrida, plead guilty in Count VI of Possession with Intent to Distribute a controlled substance, Cocaine, in violation of 21 U.S.C. Section 841(a)(1). The plea was entered in the United States District Court for the Eastern District of Missouri.

The United States of America is the Respondent.

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The Petitioner, Alfred Giuffrida, respectfully prays that a Writ of Certiorari issue to review the judgment of United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 18, 1990; and whose Petition for Rehearing was denied on November 6, 1990.

CITATIONS TO OPINION BELOW

The United States Court of Appeals issued its Opinion, and the order denying the Petition for Rehearing, which is set out in the Appendix at E and F.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit denying Petitioner's Petition for Rehearing was entered on November 6, 1990.

The Petition for Certiorari is filed within Sixty (60) days of that date. Review is sought pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

Statutes and Regulations involved:

21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(B)(ii)(II)
21 U.S.C. § 846
Federal Rules of Criminal Procedure, Rule 11(c)(1) and e(4)
Federal Sentencing Guidelines 1B1.3, 5K2.12 and 3B1.1

STATEMENT OF THE CASE

Alfred Giuffrida, Appellant/Defendant, (hereinafter Petitioner), was indicted on March 2, 1989, after being arrested in St. Louis County, Eastern District of Missouri, on February 15, 1989. Giuffrida, along with six other defendants, was charged in Count I of the Indictment with conspiring to distribute cocaine in violation of 21 U.S.C. 841(a)(1). In addition to Count I, he was charged in the substantive count of possession with intent to distribute cocaine in Count VI, along with co-defendant, Diana Bilyeu. (Appendix B).

After months of negotiations with the Office of the United States Attorney, a plea agreement stipulation was entered into by and between the United States and Petitioner, Giuffrida, wherein if Defendant entered a plea to Count VI, the Government would dismiss the remaining counts at the time of sentencing. (Appendix C). Though agreement was made as to sentencing, and it was Defendant's desire to enter the agreement, Defendant wanted to change his plea of guilty to Count VI, and did so plead, (Appendix D) and admitted that he did distribute two kilograms of cocaine.

Nothing in the stipulation (Appendix C) entered into referred to Count I of the indictment, or any of the overt acts set forth in Paragraphs 14, 16 or 18 of the indictment as to the Appellant. The only overt acts referred to was the common transaction set forth in Paragraph 25 of Count I and Count VI of the indictment. After the signing of the stipulation and plea of guilty to Count VI by Petitioner, the attorneys for the Government and Petitioner, a Pre-Sentence Investigation was ordered, and so prepared by the United States Probation Office. Objections to the Pre-Sentence Investigation Report were made by the Defendant.

Subsequent to the guilty plea, other defendants went to trial. Petitioner Giuffrida was not present at the trial to in any way cross examine or present opposition thereto of evidence as to the dates November 17 and December 10, 1988, or January 13, 1989, as to the alleged distribution of cocaine by him to co-defendant Michael Salsman. Of the twenty-five alleged overt acts mentioned in Count I, Defendant Michael Salsman was mentioned in each overt act allegation, and Petitioner-Defendant Giuffrida was referred to in seven of the allegations of the overt acts.

Objections to the report of the probation officer to the *Impact of the Plea Bargain*, was that the base offense level should be that of 28 rather than 32 of the Guidelines. This was so because the probation officer's report and the level of 32, because of 5 to 14.9 kilograms, as opposed to 2 kilograms agreed upon in the plea agreement as to Count VI.

Points were added because of Section 3B12.1 of the *Adjustment of Role in the Offense*, which increased the offense level by 4. This point was objected to because it included the conspiracy count, Count I, as to Petitioner. In the conspiracy count it was alleged that the co-defendant Salsman committed 25 overt acts as opposed to 7 overt acts of Petitioner, thereby establishing that Petitioner was not an organizer or leader.

After reviewing the Pre-Sentence Report, Petitioner moved to withdraw his plea of guilty pursuant to Federal Rules of Criminal Procedure 11(e)(4) on the basis that the offense level was elevated by incorporating the additional kilograms of cocaine.

It was Petitioner's position that the plea agreement was rejected by the Court and, therefore, he should be permitted to withdraw his plea pursuant to Rule 11.

The record of the Arraignment Transcript (Appendix D) is void at the time of the plea of guilty to Count VI of any informing of the Defendant by the Court that the Defendant is bound if the Court does not follow the recommendation to dismiss the conspiracy count as to the amount of time (level of offense) for Count VI being a 2 kilogram amount with a sentencing guideline level of 28. Also, the record shows that at the time of sentencing that the prosecutor stated the offense level would be from 10 to life. (Appendix A) (Page 7-22)

Petitioner also contended that he was coerced into acting as he did, citing the various acts of violence of co-defendant Salsman in intimidating him to participate in the drug transactions and, additionally, seeking a departure from the guidelines for sentencing pursuant to Section 5K2.12.

It was determined at the time of sentencing that Defendant was not a career criminal under the Sentencing Guidelines. Petitioner was sentenced to 222 months' incarceration.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS QUESTIONS CONCERNING THE DENIAL OF THE TRIAL COURT TO SET ASIDE A PLEA OF GUILTY PURSUANT TO RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Petitioner had been indicted with other co-defendants in Count I wherein it alleged a conspiracy to distribute and possess with intent to distribute a Schedule II narcotic controlled substance in violation of Title 21 U.S.C., Section 841(a)(I), and in Count VI with possession with intent to distribute 4.4 lbs. of cocaine in violation of 841(a)(1) and 841(b)(1).

After the pre-trial detention hearing, pre-trial motions, and numerous discussions by and between Petitioner's attorneys, and the United States Attorney, a stipulation of fact (Appendix C) was entered into wherein a plea of guilty was entered only as to Count VI of the indictment.

At the time of the plea, Petitioner was advised that at the time of sentencing, Count I of the indictment would be dismissed. (Appendix D)

The United States Attorney advised at the Court's request that the punishment range was 10 (meaning years) to life, with a Four Million Dollar Fine. (Appendix D) The Court then advised the Defendant that a Pre-Sentence Investigation would be ordered, and once again the Assistant United States Attorney advised the punishment range would be "10 to life". The Court then went on to state that nobody could given an estimate, and it could not be determined by the judge, prosecutor or the Defendant's attorneys as to what the sentence would be.

The Court then went on to find that the Defendant knew the maximum and workable understanding to Count VI, and entered a judgment of guilty to that count. (Appendix D)

The Petitioner contends that there was no accurate ability of the trial court to intelligently advise him of the maximum range of punishment.

The United States Attorney indicated a punishment of 10 years to life. The original Pre-Sentence Report of the United States Probation Office established a sentence of 262 to 327 months. If according to the plea bargain there would be only 2 kilograms, even as a career criminal the sentence would be but 140 to 175 months.

If he were determined to be a Category III level of the sentencing guidelines for 2 kilograms, the range would be 123 to 155 months. The final determination of the level of punishment was an offense level of 34, with a Category III, having a range of 188 to 235 months. Petitioner's final sentence was 222 months.

Petitioner states that the inability of the trial court, the prosecuting attorney, and his attorneys, coupled with the fact that the Court did not advise Petitioner that he is bound even if the court does not follow the recommendation by the Government, (dismissal of Count I at time of sentencing) gives rise to his right to have his plea withdrawn under Rule 11 of the Federal Rules of Criminal Procedure. *United States v. Theron*, 849 F.2d 477, 481 (10th Cir. 1988).

There is obvious confusion on the part of the Petitioner at the time of the entry of his plea as to whether he would have an offense level of 28 as opposed to 32, and the inability of the Court to advise him of the maximum term of incarceration, also violated the mandate of Rule 11. *United States v. Crusco*, 536 F.2d 21 (3d Cir. 1976).

In effect, we have a guess of what the punishment would be, rather than a statement of fact.

In *Santobello v. New York*, 404 U.S. 257, 262, the Supreme Court held when a guilty plea rests on any significant degree on a promise or agreement of the prosecution so that it can be said to be part of the indictment or consideration, such promise must be fulfilled.

As set forth in the *Federal Sentencing Guidelines and Key Compromises Under Which They Rest*, 17 Hofstra L. Rev. 8-12 (1988), that a Rule 11 may require the Court to await a Pre-Sentence Report to fully explain to the Defendant the consequences of his plea under the Guidelines.

In *United States v. Sweeney*, 878 F.2d 68, 70 (2d Cir. 1989), the Second Circuit held that attorney's representations were at best merely an estimate what he believed the likely range of punishment would be.

In effect, what basically occurs is that nobody involved at the time of the plea is capable of giving any accurate estimate of the range of punishment, be it the trial court, Government attorney, or Defendant's attorney. In effect, the plea of guilty could be contrary to the consequences conveyed to a Defendant by the District Court, which could be held as error. *United States v. Timmreck*, 99 S.Ct. 2085, Petitioner suggests that in the case at bar that it was impossible for the Court to keep a promise it could not intelligently give. *United States v. Cruz*, 709 F.2d 1111.

In regard to the conspiracy being considered in relation to Rule 11, and Plea Agreement Stipulation, see *United States v. Hernandez*, 845 F.2d 277, wherein prosecution violated the plea agreement, calling for dismissal of 432 kilos in exchange for a guilty plea to 14 kilos. The Court held the sentence should be vacated and sentencing be reset before another judge, minus evidence of the dismissed count.

It would appear that the hands of the judiciary and justice are tied awaiting the application by the sociologist of the probation department in applying the bureaucratic method of sentencing.

Petitioner, accordingly, asks this Court to review the foregoing for purposes of granting the withdrawal of the plea pursuant to Rule 11.

II. THIS CASE PRESENTS QUESTIONS CONCERNING THE MISAPPLICATION OF THE SENTENCING GUIDELINES PERTAINING TO SECTIONS 1B1.2; 5K2.12; and 3B1.1 OF THE FEDERAL SENTENCING GUIDELINES.

In the opinion of the Eighth Circuit Court of Appeals as set forth in Appendix E, the Court concludes "substantial evidence adduced that Giuffrida was involved in the distribution of much more than 2 kilograms of cocaine, thereby placing him in a 5 to 14.9 kilogram guideline range. This is so even though he, Giuffrida, pleaded only to

the substantive count of 2 kilograms as per the stipulated plea agreement. The question of the participation by Giuffrida was not proven beyond a reasonable doubt since his case was not before a jury, and though a guilty verdict was returned, it was not as to he, the Petitioner.

If the other defendants had been acquitted, would the transactions mentioned in evidence be held against Giuffrida who pleaded guilty?

Petitioner suggests that the plea of Guilty was in the parameters of the stipulation agreement. No evidence was adduced to prove beyond a reasonable doubt that he, the Petitioner, distributed or paid for the purchase of any other controlled substance as set forth in Count I.

In looking to the Federal Sentencing Guidelines Manual, 1990 Edition, Chapter 6 -- Sentencing Procedures and Pre-Agreements, the introductory commentary as to the sentencing procedures is as follows:

> This part addresses sentencing procedures that are applicable in all cases, including those in which guilty or *nolo contendere* pleas are entered with or without a plea agreement between the parties, and convictions based upon judicial findings or agreement between the parties, and convictions based upon judicial findings or verdicts. It sets forth the procedures for establishing the facts upon which the sentence will be based. Reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing.

In looking to this commentary one readily sees the necessity of "reliable fact-finding is essential to procedural due process and to the accuracy and uniformity of sentencing." The Court is suggested to review *United States v. Restrepo*, 883 F.2d 781, holding that Multiple Counts Section applies only to counts on which the Defendant has been convicted and, in effect, would conflict with Multiple Counts Section if differently applied. In effect, petitioner was only convicted as using the term interchangeably with pleading guilty to one count.

The relevant conduct referred to in the probation officer's report cites Section 1B1.3, Section1, which reads:

> "... all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense."

It is to be noted that the plea agreement was to a substantive count which occurred subsequent to any of the other conspiratorial acts by the Petitioner or the other defendants. Accordingly, it is suggested that this is no way furthered the conspiracy or reasonably was foreseeable by the Petitioner, since the act to which he plead guilty was on February 15, 1989, as opposed to earlier dates.

Additionally, Petitioner states that Section 5K2.12 of the Federal Sentencing Guidelines was not abided by the trial court since there was evidence of coercion and duress as stated by various witnesses produced at the sentencing by Petitioner, and to which there was no evidence in opposition.

Petitioner also objected to the increase of 4 levels pursuant to Section 3B1.1 of the Federal Sentencing Guidelines, Aggravating Role.

This Court is directed to Note No. 3 pertaining to this particular guideline which states:

> "Factors the court should consider include the exercise of decision making authority; the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others."

It is suggested that of the 25 various overt acts alleged, Giuffrida participated in 7, including the substantive count to which he plead guilty, as opposed to all 25, each and every one applied to the co-defendant, Michael Salsman.

A review of the indictment establishes that the majority of the decisions to further the conspiracy were all accomplished long prior to February 15, 1989, the date on which the substantive count to which Petitioner plead guilty occurred. Therefore, the exercise of decision, the nature and participation in the offense, the recruitment of accomplices, and the claimed right to a larger share of the fruits of the crime in the planning of the organization of the offense, as well as the nature and scope of the illegal activity, and the exercise and control over others was that of the real organizer, co-defendant Michael Salsman.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued to review the judgment of the United States Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

21 U.S.C.

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or * * *

Penalties

(b) Except as otherwise provided in section 845, 845a, or 845b of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving— * * *

(B) In the case of a violation of subsection (a) of this section involving— * * *

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers; or * * *

21 U.S.C.

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Federal Rules of Criminal Procedure

Rule 11

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, the the maximum possible penalty provided by law, including the effect of any special parole term and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and * * *

(e)(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

Federal Sentencing Guidelines

§ 1B1.3. Relevant Conduct (Facts that Determine the Guideline Range)

(a) *Chapters Two (Offense Conduct) and Three (Adjustments).* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

> (1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the

commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

* * *

§ 5K2.12. Coercion and Duress (Policy Statement)

If the defendant committed the offense because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defense, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. The Commission considered the relevance of economic hardship and determined that personal financial difficulties and economic pressures upon a trade or business to not warrant a decrease in sentence.

§ 3B.1. Aggravating Role

Based on the defendant's role in the offense, increase of offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. S1-89-46 CR(5)

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL SALSMAN,
JOSEPH HAAG,
ALFRED GIUFFRIDA,
DIANNA BILYEU,
MICHAEL MOIT,
STEVEN CARL McGIRT,
MICKIE JAMES MERIWETHER,
CLAYTON HOELSCHER,
DONALD MANTRO,
Defendants.

Filed: April 26, 1989

COUNT I

The Grand Jury charges:

Beginning in 1985 and continuing up through February 15, 1989, in the Eastern District of Missouri and elsewhere, the defendants

MICHAEL SALSMAN,
JOSEPH HAAG,
ALFRED GIUFFRIDA,
DIANNA BILYEU,
MICHAEL MOIT,
STEVEN CARL McGIRT,
MICKIE JAMES MERIWETHER,
CLAYTON HOELSCHER,
DONALD MANTRO,

did knowingly and willfully combine, conspire, confederate and agree among themselves and others known and unknown to this Grand Jury to distribute and possess with intent to distribute cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

THE PURPOSE OF THE CONSPIRACY

1. It was the purpose of the conspiracy that during the period of the conspiracy the defendant MICHAEL SALSMAN would and did obtain cocaine from various sources in Florida, New York, Arizona, Illinois, Missouri, California and elsewhere.

2. It was further the purpose of the conspiracy that defendants JOSEPH HAAG, ALFRED GIUFFRIDA, STEVEN CARL McGIRT and MICKIE JAMES MERIWETHER and others would and did assist defendant MICHAEL SALSMAN in obtaining cocaine.

3. It was further the purpose of the conspiracy that defendants JOSEPH HAAG, ALFRED GIUFFRIDA, DIANNA BILYEU, MICHAEL MOIT, CLAYTON HOELSCHER, DONALD MANTRO and others would and did assist the defendant MICHAEL SALSMAN in the distribution of cocaine.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants and others committed the following overt acts, among others, in the Eastern District of Missouri and elsewhere:

1. During April, 1986, the defendant MICHAEL SALSMAN attempted to purchase cocaine in Florida.

2. During July, 1986, the defendant MICHAEL SALSMAN distributed a quantity of cocaine in Iowa.

3. During August, 1986, the defendant MICHAEL SALSMAN purchased cocaine in Florida for distribution in the Eastern District of Missouri and elsewhere.

4. During October, 1986, the defendant MICHAEL SALSMAN purchased cocaine in Florida for distribution in the Eastern District of Missouri and elsewhere.

5. During January, 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Illinois for distribution in the Eastern District of Missouri and elsewhere.

6. In early 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New York for distribution in the Eastern District of Missouri and elsewhere.

7. Again in early 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New York for distribution in the Eastern District of Missouri and elsewhere.

8. In March, 1987, the defendant MICHAEL SALSMAN attempted to purchase cocaine in Arizona.

9. In April, 1987, the defendant MICHAEL SALSMAN purchased cocaine in Arizona for distribution in the Eastern District of Missouri and elsewhere.

10. In the Spring of 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Arizona for distribution in the Eastern District of Missouri and elsewhere.

11. Again in the Spring of 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in Arizona for distribution in the Eastern District of Missouri and elsewhere.

12. In July, 1987, the defendant MICHAEL SALSMAN caused cocaine to be purchased in New Jersey for distribution in the Eastern District of Missouri and elsewhere.

13. On or about December 9, 1987, in the Eastern District of Missouri the defendant MICHAEL SALSMAN causes approximately one ounce of cocaine to be distributed as alleged in Count II of this indictment.

14. During early November 1988 in the Eastern District of Missouri, the defendant Donald Mantro gave the defendant MICHAEL SALSMAN a sum of money for cocaine.

15. On or about November 17, 1988, in the Eastern District of Missouri the defendant ALFRED GIUFFRIDA distributed cocaine to defendant MICHAEL SALSMAN.

16. On or about November 17, 1988, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to defendant MICHAEL MOIT who assisted defendant MICHAEL SALSMAN in dividing the cocaine for distribution to other individuals.

17. On or about November 18, 1988 in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed a quantity of cocaine to the defendant CLAYTON HOELSCHER.

18. On or about December 10, 1988, in the Eastern District of Missouri, the defendant ALFRED GIUFFRIDA distributed cocaine to defendant MICHAEL SALSMAN.

19. On or about November 21, 1988, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER gave the defendant MICHAEL SALSMAN a sum of money for cocaine.

20. On or about December 10, 1988, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to defendant MICHAEL MOIT who assisted defendant MICHAEL SALSMAN in dividing the cocaine for distribution to other individuals.

21. On or about December 11, 19888, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed a quantity of cocaine to the defendant DONALD MANTRO.

22. On or about December 15, 1988, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid the defendant MICHAEL SALSMAN a sum of money for cocaine.

23. On or about January 13, 1989, in the Eastern District of Missouri, the defendant ALFRED GIUFFRIDA distributed cocaine to the defendant MICHAEL SALSMAN.

24. On or about December 17, 1988, in the Eastern District of Missouri, the defendant DONALD MANTRO paid the defendant MICHAEL SALSMAN a sum of money for cocaine.

25. On or about January 13, 1989, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to defendant MICHAEL MOIT who assisted defendant MICHAEL SALSMAN in dividing the cocaine for distribution to other individuals.

26. On or about January 14, 1989, in the Eastern District of Missouri, the defendant MICHAEL SALSMAN distributed cocaine to the defendant CLAYTON HOELSCHER.

27. On or about January 24, 1989, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid money to the defendant MICHAEL SALSMAN for cocaine.

28. On or about January 30, 1989, in the Eastern District of Missouri, the defendants CLAYTON HOELSCHER and MICHAEL SALSMAN discussed a cocaine transaction.

29. In early February, 1989, in the Eastern District of Missouri, the defendant ALFRED GIUFFRIDA gave money to defendant MICHAEL SALSMAN to purchase cocaine.

30. In early February, 1989, as alleged in Count III, the defendants MICHAEL SALSMAN, JOSEPH HAAG and STEVEN CARL McGIRT travelled from the Eastern District of Missouri to Los Angeles, California to purchase cocaine.

31. On or about February 4, 1989, in the Eastern District of Missouri, defendant DONALD MANTRO paid money to the defendant MICHAEL SALSMAn for cocaine.

32. On or about February 12, 1989 in Los Angeles, California, the defendant MICKIE JAMES MERIWETHER distributed cocaine to a person who was acting for and on behalf of defendants MICHAEL SALSMAN, JOSEPH HAAG, ALFRED GIUFFRIDA and STEVEN CARL McGIRT.

33. On or about February 4, 1989, in the Eastern District of Missouri, the defendant CLAYTON HOELSCHER paid a sum of money to the defendant MICHAEL SALSMAN for cocaine.

34. On or about February 15, 1989, in the Eastern District of Missouri, the defendants MICHAEL SALSMAN and JOSEPH HAAG did possess cocaine with intent to distribute as alleged in Count IV of this indictment.

35. On or about February 15, 1989, in the Eastern District of Missouri, the defendants MICHAEL SALSMAN and JOSEPH HAAG did cause the distribution of cocaine to defendants ALFRED GIUFFRIDA and DIANNA BILYEU as alleged in Count V of this indictment.

36. On or about February 15, 1989, in the Eastern District of Missouri, the defendants ALFRED GIUFFRIDA and DIANNA BILYEU did possess cocaine with intent to distribute as alleged in Count VI of this indictment.

All in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(B)(ii)(II) and 846. * * *

COUNT VI

The Grand Jury further charges:

On or about February 15, 1989, in St. Louis County, in the Eastern District of Missouri, the defendants

ALFRED GIUFFRIDA and
DIANNA BILYEU,

did knowingly possess with specific intent to distribute approximately 4.4 pounds of cocaine, a Schedule II narcotic drug controlled substance.

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B)(ii)(II). * * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NO. S1-89- CR(5)

UNITED STATES OF AMERICA,
Plaintiff,

v.

MICHAEL SALSMAN, et al.,
Defendants.

STIPULATION OF FACT

Comes now the parties and pursuant to Section 6B1.4, Sentencing Guidelines and Policy Statements (October, 1987) and the Administrative Order of this Court (January 28, 1988) and hereby stipulates that the following facts are relevant for the purpose of sentencing in the above cause:

As to Count VI of the indictment, the defendant Alfred Guiffrida did knowingly possess with intent to distribute, approximately 4.4 pounds of cocaine, a Schedule II narcotic drug controlled substance. Specifically the evidence would show that Mr. Guiffrida and a co-defendant Diana Bilyeu, entered an apartment at a motel in north St. Louis County. Guiffrida directed Bilyeu to pick up the cocaine and when both defendants left the apartment, they were arrested and the cocaine was retrieved.

The evidence also would show as to these two kilograms of cocaine that Alfred Guiffrida assisted in the financing of the purchase of these two kilograms of cocaine.

The evidence also shows that Mr. Guiffrida has been convicted of prior felony convictions including a federal conviction of Making Interstate Threats By Means Of A Telephone. He also has a prior felony conviction for Possession of Cocaine associated with violation

of the Missouri Controlled Substance laws. Both of these offenses occurred within the last ten years and the defendant was on probation for both of these offenses at the time of the offense alleged in Count VI of this indictment in which the defendant is now pleading guilty.

No plea bargains have been entered into between the Government and the defendant Guiffrida other than if the defendant pleads guilty to Count VI and the Court accepts that plea, the Government would move to dismiss the remaining counts at the time of sentencing.

Respectfully submitted,

THOMAS E. DITTMEIER
United States Attorney

8/23/89

/s/ MICHAEL W. REAP
Assistant United States Attorney

ALFRED GIUFFRIDA
Defendant

STEPHEN GILMORE
Attorney for Defendant

APPENDIX D

* * *[7] THE COURT: You are now faced with two charges, and we are ready to go to trial, Count I and Count VI.

Count I is a conspiracy count involving the use of drugs; and Count VI is a possession charge, with intent to distribute a certain amount of cocaine; which offense occurred, purportedly, on February 15, 1989.

Is it your desire at this time to enter into this plea bargaining arrangement, subject to may approval?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you wish to change your plea from not guilty to guilty as to Count VI as a result of this agreement?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right.

I have just read the two-paged stipulation of facts, and I will consider that further in a few moments, but I am looking at it now solely for the purpose of the plea bargaining arrangement.

I will accept the plea that is entered into between Mr. Giuffrida and the Government;

And if I, in fact, accept his plea of guilty as to Count VI, then at the time of sentencing I will dismiss Count I.

Before we go into this more fully, Mr. Giuffrida, [8] there are a few things I need to do to refresh my memory.

How old are you, again?

THE DEFENDANT: Thirty-four years old, your Honor.

THE COURT: How much education have you had?

THE DEFENDANT: Almost a year of college.

THE COURT: How long have you been incarcerated in this matter?

THE DEFENDANT: A little over six months, your Honor.

THE COURT: Are you under the care and treatment of any physician, whereby drugs or medicines are prescribed for your use?

THE DEFENDANT: No, your Honor, outside of for stomach pills, Tagament.

THE COURT: What kind of stomach pills are you taking?

THE DEFENDANT: It's for an ulcer.

THE COURT: Do you know what the medicine is called?

THE DEFENDANT: Cimetidine.

THE COURT: When was the last time you took it?

THE DEFENDANT: Yesterday.

THE COURT: You ingest it by mouth?

THE DEFENDANT: Yes, sir.

THE COURT: You took one of these Tagaments yesterday?

THE DEFENDANT: Yes, sir.

[9] THE COURT: What affect does it have on you with respect to your ability to be oriented as to where you are and be able to read and understand?

THE DEFENDANT: None, your Honor.

THE COURT: You understand that you're here this morning, telling me that you want me to approve a plea bargaining arrangement?

THE DEFENDANT: Yes, sir.

THE COURT: And you want to change your plea of not guilty to guilty on Count VI of this indictment?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand what you're doing?

THE DEFENDANT: Yes, your Honor.

THE COURT: Even though you tell me you are completely oriented in this matter, I want to know whether, in the last twenty-four hours, even though you're incarcerated, you have imbibed any drugs or medicine or alcoholic beverages, other than the capsule or pill you just told me about that you take for ulcers?

THE DEFENDANT: None, your Honor.

THE COURT: That would prevent you from understanding what you're doing?

THE DEFENDANT: I understand, your Honor.

THE COURT: You understand the nature of these two charges in Count I and Count VI, do you not?

[10] THE DEFENDANT: Yes, your Honor.

THE COURT: You have a copy of the indictment, do you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Basically, Count VI, as I indicated, indicates that on February the 15th, 1989, and and Diana Bilyeu possessed, with intent to distribute, four and four-tenths pounds of cocaine, in violation of the law.

How do you plead to that count, sir?

THE DEFENDANT: Guilty, your Honor.

THE COURT: Mr. Gilmore, is there any information that you have that would indicate that your client is not competent to enter into a plea bargaining arrangement with the Government, and is not competent to enter a plea of guilty to Count VI?

MR. GILMORE: No, your Honor.

THE COURT: Any information you have, Mr. Reap?

MR. REAP: I have none at all, Judge.

THE COURT: Now on the basis of my review of the two-paged stipulation of facts that has been purportedly executed by Mr. Giuffrida, and my examination of the file, and the entire record in this case, and my dialogue with Mr. Giuffrida and with his attorneys, I find that Alfred Giuffrida is compe- [11] tent to enter a plea bargaining arrangement with the Government, and is competent to enter a plea of guilty to Count VI of this indictment.

Now, Mr. Giuffrida, you have been talking with Mr. Gilmore and Mr. Lee about this matter and proceedings, have you not?

THE DEFENDANT: Yes, your Honor.

THE COURT: They have been your counsel throughout?

THE DEFENDANT: Yes, your Honor.

THE COURT: You had an opportunity to talk about it with them, both personally and on the telephone, on several occasions?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have they gone over with you the merits and the shortcomings of this case?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have they discussed with you any questions that you have asked and attempted to give answers to you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you satisfied with their representation, are you not?

THE DEFENDANT: Very much so.

THE COURT: I am sure they have told you that if I accept your plea of guilty, that you are giving up some valuable rights; the main right that you are giving up is the one [12] right now, that is to go to trial before a jury.

THE DEFENDANT: Yes, your Honor.

THE COURT: By entering your plea of guilty, you no longer have a jury trial right, do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: If you had elected to maintain your former plea of innocence in this case, and gone to trial with the other defendants in this case, then the Government would have had the burden of proving you guilty beyond a reasonable doubt;

You would not be required to testify, if after discussion with Mr. Gilmore you elected not to;

You would not be required to call witnesses or present a defense.

And if you had followed that procedure, I would have instructed the jury that the jury could not consider that fact in determining whether you were guilty or innocent.

The reason is that you have no burden to prove your innocence; the Government has the burden to prove your guilt.

And you are giving up these rights, which are incident to your right to a trial by jury, by entering a plea of guilty; do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: I have said to you that you have the right to remain silent under the Fifth Amendment to the Constitution of our country.

[13] There is a provision that no person can be compelled to say something that might incriminate them.

So you could remain silent.

But you're giving up that right today by talking to me.

You're telling me you're guilty and you're answering my questions, so you no longer have the right to remain silent, because you're abandoning that by pleading guilty.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Knowing that you're giving up all of these rights, is it still your intent to enter into this plea bargaining arrangement and enter a plea of guilty to Count VI?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Giuffrida, you have been in jail, you tell me, for several months.

Has anybody down there, or any other person, or any other entity, or anyone at all, threatened you or coerced you or intimidated you in any way at all to cause you to come in here and change your mind and enter a plea of guilty?

THE DEFENDANT: No, your Honor.

THE COURT: Has anyone made any promises or predictions or prophecies to get you to do this?

THE DEFENDANT: No, your Honor.

THE COURT: You're doing it of your own free will, on [14] a completely voluntary basis?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you sure of this?

THE DEFENDANT: Yes, your Honor.

THE COURT: Mr. Giuffrida, I generally inquire of a person who desires to enter a plea of guilty, for that person to set out for me, in their own words, what they did, so that I can be convinced that you are, in fact, guilty of this charge, as you tell me you are.

I have referred to this two-paged stipulation of fact with respect to a portion of the stipulation that is applicable to the plea bargaining; but I now want to go through the remainder of the portion of the stipulation that has to do with your participation in this offense.

Is that your signature?

THE DEFENDANT: Yes, your Honor.

THE COURT: And apparently that of Mr. Gilmore and Mr. Reap, as well

Now rather than have you described in your own words what the facts were in this matter, have you read this two-paged stipulation?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you gone over it carefully?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you discussed it with Mr. Gilmore?

[15] THE DEFENDANT: Yes, your Honor.

THE COURT: Are the facts set out in this two-paged stipulation correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: There is no change or deviation you would make to any of this?

THE DEFENDANT: No, your Honor.

MR. REAP: If I may ask one question to augment the record:

Did you intend to distribute the two kilograms of cocaine that are mentioned in this stipulation?

THE DEFENDANT: Yes, your Honor.

THE COURT: I will file this stipulation in this case as it pertains to Mr. Giuffrida, and cause it to be made part of the record.

And on the basis of the material that is in there, it is my opinion that there is no question but what Mr. Giuffrida is, in fact, guilty of the charges in Count VI, as he tells me he is.

One other item we need to consider with you, Mr. Giuffrida, involves sentencing.

It will be my duty to sentence you in this case.

You have discussed the range of the punishment with Mr. Gilmore, have you not?

THE DEFENDANT: Yes, your Honor.

[16] THE COURT: Let me go over it again with you.

MR. REAP: Your Honor, if I may interrupt, everything is doubled as to Mr. Guiffrida, because he has a prior narcotics conviction.

And we pled a criminal information, noticing up Mr. Giuffrida and his counsel of that fact.

So it would be doubled.

THE COURT: The minimum and the maximum?

MR. REAP: The minimum would be 10 to life; $4 million; or a minimum 8 years supervised release.

THE COURT: And 80 years?

MR. REAP: Ten to life, the statute says.

THE COURT: Oh, 10 to life.

Well, let's go over it again.

Under the ordinary circumstances, the maximums would be different; but you have indicated in your stipulation of fact that within the last ten years you do have a prior felony conviction for possession of cocaine, which I assume was in the Missouri courts, is that right?

The State of Missouri court?

THE DEFENDANT: Yes, your Honor.

THE COURT: In view of that, I think the announcement by Mr. Reap is right.

That means that there is a 10 year minimum incarceration period for Count VI, and a maximum of life imprisonment.

[17] And that there is a fine having a maximum of $4 million.

There is a supervised release period of not less than eight years.

The supervised release period would apply to anytime after you have served whatever sentence is given you.

Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you have any questions about his maximum range of punishment, a well as the minimums I have set out?

THE DEFENDANT: I understand it, your Honor.

THE COURT: I am sure Mr. Gilmore has also told you that we have a new law not with respect to sentencing; and no longer does the Court have the option to determine what the sentencing is.

If I accept your plea of guilty, I am going to order a presentence investigation report.

The Probation Office will prepare that after he or she has interviewed you and Mr. Gilmore and the Government's attorney and others.

Now this will set out with particularity all of the information about your background, your education, your family, your history, your work record, the specific information concerning your prior convictions, everything about you, including [18] the facts of this case, that will need to be inserted into a formula.

Once this background information is inserted into a formula, then the formula will be measured by the new law that Congress has passed. We commonly refer to it as the Sentencing Guideline law.

When that is done, then the probation officer will submit what he or she feels is the proper range of punishment that I must use.

We also know that the law provides a minimum and a maximum. Ten years — eight years —

MR. REAP: Ten to life.

THE COURT: It is 10 years — 10 years and the life.

Now when the information on you is inserted and the formula comes out with an answer, the range may be different. Instead of 10 year, it could be 15 years to life, or it could be 10 years to 30 years, or 10 years to 25 years, or 10 years to 50 years.

You understand that when these ingredients go into the formula, that this type of information is the end result.

When we get that result, we call that the range of punishment. There is a minimum then and a maximum.

Under the ordinary circumstances, I am required to stay within that range.

So, I must give you at least the minimum; but I can't [19] give you more than the maximum.

So if the maximum happens to be 25 years, and I elect to give you the maximum, then I couldn't give you more than 25 years, even though the statutes provides for life.

Now I am just giving this to you as an illustration, because we do not know what this range is going to be.

Mr. Gilmore may have tried to estimate it for you; Mr. Reap could even try it, and I could even try it, but we may not be right.

If Mr. Gilmore has given you an estimate, and he is doing this for your benefit, so you can attempt to know where you are in this, but he may be wrong.

So I want you to know, if he has given you any kind of an estimate at all, it's only an estimate.

And if anyone has told you that these are the specific Guidelines that I will be following with respect to the range of punishment, then it's only an estimate only; do you understand that, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now I have said that I must stay within these Guidelines, once they are determined, that is, the range of punishment.

There is one exception.

If there are extraordinary circumstances, something that we haven't thought of, or that Congress didn't think of [20] when the law was enacted, that I think is appropriate in your case, then I have a right to deviate from the Guidelines. I can go beyond them.

So if your Guidelines, under those circumstances, we'll say, are 10 to 25 years, and I felt there was something extraordinary about your case that would enable me to go beyond the 25 years, then I could conceivably extend it, we'll say for illustration, to 35 years.

Now this is unusual. I rarely do it. I have never done it, as a matter of fact.

But I have the right to do it under these exceptional circumstances.

I want you to understand that I do have the right to do it.

You do understand it?

THE DEFENDANT: Yes, your Honor.

THE COURT: But under the ordinary circumstances, under the law, I must stick to the range of punishment that is ultimately determined.

THE DEFENDANT: Yes, your Honor.

THE COURT: Now before we make that ultimate decision, the Probation Officer will submit a copy of this report to you, and to Mr. Gilmore.

You will have an opportunity to go over it, and so will Mr. Gilmore.

[21] You will be able to come before me and tell me if you think there is a mistake, the Probation Officer has said something, but that you think is wrong, then you will have the right to tell me that.

If I think you're right, then I will cause the report to be corrected.

Mr. Gilmore will have the same opportunity with respect to the law.

If he thinks here has been a misapplication of the law in calculating the range of punishment, then he will tell me, and I will listen to him.

And if he can convince me that he is rights, and there is a mistake, then I will make the correction.

So both of you will have ample opportunity to make whatever objections or corrections to the report, before sentencing, that you wish to make.

Do you understand that, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: Very well.

Alfred Giuffrida, since you know your right to a trial;

Since you are voluntarily entering a plea of guilty to Count VI in this case, pursuant to a plea bargaining arrangement, which I indicated to you I am going to approve;

Since you are voluntarily entering a plea of guilty;

[22] Since you know what the maximum and minimum possible punishment is in this case, and have a workable understanding of the sentencing mechanics under the new Sentencing Guidelines law, I am going to accept your plea of guilty as to Count VI, and enter a judgment of guilty as to that count.

Mr. Gilmore, what is your calendar on November the 13th?

MR. GILMORE: I am sure we are available.

THE COURT: Mr. Reap?

MR. REAP: That's fine.

THE COURT: The sentencing in this case will be set for Monday, November the 13th, at 1:00 p.m.

I will order a presentence report under our Local Rules.

Counsel and Mr. Giuffrida will have an opportunity to review it and then file whatever objection you wish to file.

Is there any other item we need to consider in this matter?

MR. REAP: Not on this, your Honor.

MR. GILMORE: None.

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Ann J. Taylor
Official Court Reporter

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1101

United States of America,

Appellee,

v.

Alfred Giuffrida,

Appellant.

Appeals from the United States District Court
for the Eastern District of Missouri.

Submitted: September 10, 1990
Filed: September 18, 1990

Before FAGG and BEAM, Circuit Judges, and WOODS*, District Judge.

WOODS, District Judge.

The appellants in these consolidated appeals were members of a cocaine distribution ring operating in the St. Louis area, with supply connections in California. Other than the appellants, indictments were secured against Michael Salsman, Dianna Bilyeu and Donald Mantro who pled guilty to drug offenses in connection with activities of the group. Appellant Giuffrida also pled guilty but now appeals, alleging errors in sentencing and in denying his motion to withdraw his guilty plea. The other five appellants entered not guilty pleas and were tried jointly before a jury in the United States District Court for the Eastern District of Missouri.[1] On September 1, 1989, guilty verdicts were

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* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

[1] The Honorable Stephen N. Limbaugh, United States District Judge for the Eastern District of Missouri.

returned against appellants Michael Moit, Joseph Haag, Steven Carl McGirt, Mickie Meriwether and Clayton Hoelscher, and sentences were imposed ranging from 78 months to 120 months, Giuffrida received 220 months on his guilty plea. All filed separate appeals and are represented by separate counsel. Since they raise different grounds for reversal, along with some common grounds, the points raised by each will be discussed, *infra*, along with the specific statutory offenses charged against each appellant. We note, however, at the outset that no prejudicial error is found in the conduct of this lengthy trial and affirm the judgment of conviction as to all six appellants.

The success of the prosecution in this case is due in large measure to the activities of Frank Bennett, a confidential informant who began cooperating with the Federal Bureau of Investigation and Internal Revenue Service in the fall of 1988. On November 7, 1988, Bennett, an employee of Michael Salsman, saw Giuffrida give Salsman a kilo of cocaine, after which Bennett drove Salsman to Moit's house to break up and weigh it since Moit had a scale. Salsman told Bennett later that Moit had received six ounces of the cocaine. The next day Salsman delivered cocaine to a number of other individuals including appellant Clayton Hoelscher at his bar in Troy, Missouri. Three days later on November 21, 1988 Bennett observed Hoelscher giving Salsman $5,000 in cash, which coincided with a bank withdrawal of an identical amount by Hoelscher on the same date.

On December 10, 1988, Bennett saw Salsman pay Giuffrida $10,000 for a kilo of cocaine. Again Bennett and Salsman went to Moit's house to break up the cocaine, which was distributed to other dealers. Salsman told Bennett that Moit received eight ounces of the cocaine. Bennett did not observe any delivery to Hoelscher after the transaction. Salsman received $4,500 from Hoelscher during this time frame.

Salsman received a third kilogram from Giuffrida on January 13, 1989. The same visit to Moit's house was made by Bennett and Salsman. Bennett observed the breaking of the cocaine into smaller packages and its weighing. Moit kept six ounces and the remainder was distributed to other including Hoelscher.

On January 19, 1989 Bennett recorded a conversation between Moit and Salsman in which Salsman remarked that Clay Hoelscher wanted 20 more ounces of cocaine. Moit complained that one of his customers, who owed him $2,800, lost these funds in a burglary and could only pay $500. He also complained about a competitor undercutting him on price in Wright City, Missouri. Moit also mentioned trading an ounce of cocaine for $2,000 in repairs on his truck. On the next day Bennett recorded a conversation with Haag and Salsman in which Haag expressed admiration for the boldness of black cocaine dealers and the quality of their product.

While Salsman was contemplating a trip to California for a supply of cocaine, Bennett recorded a conversation on January 30, 1989 between Salsman and Hoelscher in which the latter suggested a source in Columbia that might obviate a California buy. The Columbia buy did not materialize and plans were made by Salsman to obtain three to five kilograms of cocaine in California.

Giuffrida contributed $45,000 to this buy. Others contributed $21,000, including Mantro, one of the co-conspirators who entered a guilty plea. On February 7, 1989, Salsman sent Bennett to California in a rented Winnebago with $65,000 concealed inside the paneling. In Los Angeles Bennett was to meet Salsman, Haag, who was to receive some of the cocaine, and "Cedric," a black male who was to assist in making the California buy. While en route to California on February 9, 1989, Bennett talked by telephone to Salsman and Haag, who had flown to Los Angeles and were at the Viscount Hotel. He learned that "Cedric" had failed to arrange the drug buy and had been beaten up for his efforts. "Cedric" was sent back to St. Louis.

Haag persuaded Salsman to remain in Los Angeles and develop another source. He suggested that appellant McGirt, back in St. Louis, had a cocaine source in Los Angeles. On February 10, 1989 Bennett, Haag and Salsman checked into Room 2169 of the Airport Marriott Hotel, from which Haag contacted McGirt and convinced him to come to Los Angeles.

A Los Angeles deputy sheriff saw Salsman, Haag, McGirt and appellant Meriwether meet at the airport on February 10, 1990.

McGirt checked into Room 2167 at the Airport Marriott. On February 11, 1989 Bennett met with McGirt, Haag and Salsman. Haag snorted some cocaine given to him by McGirt, which the latter had obtained from Meriwether. Salsman instructed Bennett to retrieve the money from the Winnebago, and $60,000 was counted by Bennett, Haag, Salsman and McGirt and given to McGirt. A surveillance by the Los Angeles sheriff's department traced McGirt to a meeting with Meriwether prior to their driving away in a maroon/black Cadillac, a vehicle again observed at the time a search warrant was executed on Meriwether.

Salsman, Haag, McGirt and McGirt's girl friend returned to St. Louis. Meriwether delivered the cocaine to Bennett along with $65,00 of which $760 was returned to Meriwether. Bennett drove back to St. Louis with the money and the cocaine. He contacted Haag and set up a meeting at the Henry VIII Inn, St. Louis for February 15, 1989. The meeting was monitored by audio and video tapes. At this meeting Salsman and Haag tasted the cocaine. Haag mentioned that Giuffrida had an additional $45,000. He was concerned about a possible theft if they continued "fronting the money." He also mentioned telling his people about the cocaine and referred to his brother as having a triple beam scale. When Haag and Salsman left, the latter had physical possession of a kilo of the cocaine and the money returned to Bennett by Meriwether. The were immediately arrested. Subsequently Giuffrida came to the Henry VIII Inn with Dianna Bilyeu, whom he had designated to pick up his share of the cocaine. They were arrested upon their departure. After the execution of a search warrant on his residence in Los Angeles, appellant Meriwether was arrested on February 15, 1989.

In Count I of the indictment the appellants, along with Michael Salsman, Donald Mantro and Dianna Bilyeu, were indicted for violation of Title 21 U.S.C. § 846 (conspiracy to distribute cocaine). In Count II Salsman was indicted for an additional violation of distribution of cocaine. Along with McGirt, Salsman and Haag were charged with violation of Title 18 U.S.C. § 1952(a)(3) in Count III (interstate transportation in Aid of Racketeering). Haag and Salsman were charged in Count IV with violation of 21 U.S.C. § 841(a)(1) and

841(a)(1)(B)(ii)(II) (possession with intent to distribute 2.2 pounds of cocaine on February 15, 1989) and in Count V for violation of the same section by distributing 4.4 pounds of cocaine on the same date. Alfred Giuffrida and Dianna Bilyeu were charted in Count VI with violation of the same section by possession of 4.4 pounds of cocaine with intent to deliver. Salsman was charged in Count VII with violation of 21 U.S.C. § 848 (continuing criminal enterprise) and in Count VIII for filing a false tax return in violation of Title 26 U.S.C. § 7206(1).

Prior to trial Salsman pled guilty to the continuing criminal enterprise and tax violation (Counts VII and VIII) and received a sentence of 280 months. Alfred Giuffrida pled guilty to Count VI as did Dianna Bilyeu. The former received a sentence of 220 months and the latter 63 months. Prior to trial Donald Mantro pled guilty to a superseding felony information and received a sentence of 41 months.

A recitation of the above facts which are supported by substantial evidence demonstrates that each of the appellant was deeply involved in a conspiracy to distribute large quantities of cocaine. Giuffrida, Salsman and Haag provided directions for the conspiracy and furnished the operating funds. Hoelscher and Moit were middlemen and wholesalers in the chain of distribution, while McGirt and Meriwether were involved with procuring a supply of the product in California. Evidence implicating all of the appellants is both direct and circumstantial. We now address the specific contentions of the appellants.

* * *

VI. ALFRED GIUFFRIDA

A. Withdrawal of Guilty Plea

Appellant pled guilty to Count VI of the indictment. Count I was then dismissed. The sentencing transcipt showed that the trial judge fully explained appellant's rights to him and the implications of his guilty plea under both the statute and the guidelines. Count VI charged that on February 15, 1989 appellant had distributed 4.4 pounds of cocaine. Appellant claims that when he entered his plea, it was his understanding that he could only be held reponsible for the amount of

cocaine alleged in Count VI. In other words, the guideline range would be restricted to a computation based on 4.4 pounds or 2 kilograms of cocaine.

Judge Limbaugh's explanation refutes such a contention:

> Now when the information on you is inserted and the formula comes out with an answer, the range may be different. Instead of ten years, it could be fifteen years to life, or it could be ten years to thirty years, or ten years to twenty-five years, or ten years to fifty years.
>
> * * * *
>
> So if the maximum happens to be 25 years, and I elect to give you the maximum, then I couldn't give you more than twenty-five years, even though the statute provides for life.
>
> * * * *
>
> Mr. Gilmore may have tried to estimate it for you; Mr. Reap could even try it, and I could even try it, but we may not be right. If Mr. Gilmore has given you an estimate, and he is doing this for your benefit, so you can attempt to know where you are in this, but he may be wrong. So I want you to know, if he has given you any kind of estimate at all, it's only an estimate. And if anyone has told you that these are the specific Guidelines, that I will be following with respect to the range of punishment, then it's only an estimate only; do you understand that, sir?
>
> The Defendant: "Yes, your honor."

(Tr. 18-19).

At the trial substantial evidence was adduced that Giuffrida was involved in the distribution of much more than two kilograms of cocaine. Distribution was established, placing him in the guideline range for 5 to 14.9 kilograms of cocaine. This range used by Judge Limbaugh from the Guidelines for sentencing Giuffrida was entirely permissible. *See United States v. Fernandez*, 877 F.2d 1138, 1140-43 (2d Cir. 1989) where there was a course of conduct and common

scheme for distribution of 25 kilograms of cocaine. This amount was used to determine the Guideline range and not the five kilograms recited in the single count to which defendant pled guilty. Defendant claimed that he misunderstood such an application of the guideline and sought to withdraw his guilty plea. His motion was denied. *See also United States v. Sweeney*, 878 F.2d 68, 69-70 (2d Cir. 1989). Appellant in the case before us was told the range of punishment and further told that the Guidelines applied. We apprehend no basis for setting aside appellant's plea of guilty.

B. Alleged Errors in Guideline Computation

Concomitant with his argument concerning withdrawal of his guilty plea, appellant contends that only the two kilograms in the count to which he pled guilty should be considered in computing the Guideline range. The evidence of the trial showed that appellant was involved in the distribution of five and perhaps six kilograms of cocaine. Contrary to appellant's contention, the additional kilograms of cocaine were proper components of the guideline computation. All relevant conduct can be used to arrive at the guidelines range under Sections 181.3 and 301.2 of the Guidelines. *United States v. Allen*, 886 F.2d 143 (8th Cir. 1989); *United States v. Ehret*, 885 F.2d 441, 444-45 (8th Cir. 1989); *United States v. Mann*, 877 F.2d 688, 689-90 (8th Cir. 1989).

Giuffrida's other exceptions to the Guidelines computation are without merit. The record is devoid of any evidence that he acted under duress from Salsman. Appellant gave Salsman $45,000 to buy cocaine in California and came voluntarily on February 15, 1989 to the Henry VIII Inn to pick up his share of the purchase. He delivered cocaine with regularity to Salsman each month in late 1988 and early 1989. His actions are hardly those of an individual under duress.

Giuffrida complains of the upward adjustment in the Guidelines because he was an organizer or leader. We agree with the trial judge that this man was a leader and organizer of the drug ring under Guidelines Section 3B1.1. Such a determination is not clearly erroneous, which is the proper standard for review. *United States v. Holland*, 884 F.2d 354, 358 (8th Cir. 1989).

The judgments of conviction are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1101EM

United States of America,

Appellee,

v.

Alfred Giuffrida,

Appellant.

Order Denying Petition for Rehearing
with Suggestion for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

November 6, 1990

Order Entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

Civil situations involving important state interests. See, e.g., Moore v. Sims, 442 U.S. 415 (1979) (custody), and Judice v. Vail, 430 U.S. 327 (1977) (contempt).

We will not belabor the point that child custody has historically been viewed as an area of important state interest. See e.g. 23 PA. C.S.A. #5301-5314 (codifying Pennsylvania's law regarding child custody). Under the pertinent statutory provisions and Pennsylvania Rule of Civil Procedure, see, e.g., PA. R. Civ. R. 1915.1 et seq., Courts of Common Pleas are empowered to hear all claims arising out of matters pertaining to child custody. In fact, Pennsylvania courts may address claims of federal constitutional deprivation in connection with child custody matters. See, e.g., Vanaman v. Cowgill, 526 A. 2d. 1226 (PA. Super. 1987); Bruzzi v. Bruzzi, 481 A. 2d. 648 (PA. Super. 1984). Furthermore,

temporary custody or visitation orders of the Court of Common Pleas, such as the order about which plaintiff here complains, are appealable to the Superior Court of Pennsylvania. See, e.g., Lewis v. Lewis, 271 Pa. Super. 519 414 A 2d 375 (1979), cert. denied, 449 U.S. 877 (1980). Thus, we are convinced that the instant suit involves an important state interest and the state provides adequate procedures for vindication of federal rights so that abstention is appropriate. Plaintiff's suit, "while raising constitutional issues, is at its core a child custody dispute." Coats v. Woods, 819 F> 2d 236, 237 (9th Cir. 1987), cert. denied and app. dismissed, 484 U.S 802 (1987). The courts of the Commonwealth are the appropriate fora for Plaintiff's claims.

We are, of course, aware of the rule that abstention is not appropriate if state

proceedings have been initiated to harass the plaintiff or if they are otherwise brought in bad faith. See, e.g. Younger, 401 U.S. at 47-48, 54. Thus, we ordered the parties to submit the requested stipulation regarding the proceedings in the Court of Common Pleas and to address the issue of the appealability of the temporary order revoking plaintiff's visitation rights. The records of the proceedings in the Court of Common Pleas attached as Exhibits to the affidavit of Nancy Stark, particularly exhibit H, I, and J, which plaintiff has not challenged, demonstrate that there is no evidence that the proceedings were instituted for any purpose other than determining the best interest of Amanda Mayercheck. Similarly, as set forth above, temporary orders revoking visitation rights are appealable. See, Lewis v. Lewis, supra. Finally, Plaintiff informed the court by

letter dated May 6, 1990, that the Supreme Court of Pennsylvania heard his case on March 9, 1990. Under these circumstances, abstention is particularly appropriate. Accordingly, we abide by our earlier tentative conclusion that abstention is warranted and for the reasons set forth above, and for the reasons stated on the record at the January 17, 1990 hearing and oral argument, we hold that this court should abstain from plaintiff's injunctive and declaratory relief claims.

Furthermore, we not, as did the Court of Appeals in Mayercheck v. Cashman, et.al, No. 89-3024 (May 18, 1989), that the judicial defendants are absolutely immune from liability for damages for judicial decision made within the "judges" subject matter jurisdiction. Under Stump v. Sparkman, 435 U.S. 349 (1978), this immunity applies whether the judge acts in error,

with malice, or in excess of his or her authority. As the judges here acted within their jurisdiction, they are immune.

Finally, the Supreme Court of Pennsylvania and the Court of Common Pleas of Allegheny County, as arms of the state, are entitled to Eleventh Amendment sovereign immunity. See, e.g. Mattas v. Supreme Court of Pennsylvania, 576 F. Supp. 1178, 1182 (W.D.PA. 1983). Accordingly, we hold that these defendants are immune from damages.

An appropriate order will follow.

s/Gustave Diamond

Date: May 10, 1990
cc: Matthew Jackson, Jr. Esq.
1017 Fifth Avenue
Pittsburgh, Pa. 15219

Nancy E, Stark, Esq.
1515 Market Street
Suite 1414
Philadelphia, PA. 19102

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. MAYERCHECK,DMD, Plaintiff,	)	
	)	CIVIL
v.	)	ACTION NO.
	)	90-16
SUPREME COURT OF PENNSYLVANIA, THE HONORABLE W.TERRENCE O'BRIEN) THE HONORABLE R. STANTON WETTICK) THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA, and THE HONORABLE DAVID CASHMAN, Defendants.	)	

ORDER OF COURT

AND NOW, this 10th day of May, 1990, for the reasons stated in the opinion filed this day and for the reasons stated on the record at the hearing and oral argument on January 17, 1990, which are incorporated herein by reference, IT IS ORDERED that the motion to reassign the instant case to the Honorable D. Brooks Smith be, and the same hereby is denied.

IT IS FURTHER ORDERED that defendant's motion to dismiss and amended motion to

dismiss be, and the same hereby, are,

granted and the complaint is dismissed.

s/Gustave Diamond
United States District
Judge

cc: Matthew Jackson, Jr. Esq.
1017 Fifth Avenue
Pittsburgh, Pa. 15219

Nancy E, Stark, Esq.
1515 Market Street
Suite 1414
Philadelphia, PA. 19102

NEIL ROSENBLUM, PHD
CLINICAL PSYCHOLOGIST

Fairfax Apartments - Suite 109
4614 Fifth Avenue
Pittsburgh, PA 15213
(412) 621-3335

July 17, 1987

Dear Ellen and Joe:

After meeting with each of you and spending two sessions with Amanda I can only offer some guiedlines and recommendations regarding the custody problems which you have been experiencing. It is my opinion that Amanda loves each of you and is presently comfortable in both of her homes. Her relationship with Barbara has been more secure over the past two years. I feel that Mandy is not comfortable with the present custody schedule. It is awkward, choppy and uneven. It is my impression that she desires more balance in the schedule. She of course is also influenced and still caught in the middle by the desire of each parent to maximize their time with her. She knows that Joe wants more time with her and that Ellen doesn't want to give any time up.

I feel that some form of joint custody is the best solution for Amanda and your families. This implies cooperation, mutual decision-making and the legitimacy and importance of each home environment. If successful it would free Amanda from the tension and competition between her two homes. I feel that Amanda needs this now. She has grown up for years being exposed to conflict between her parents and this is not healthy for her. She would like you to put aside your differences and "share" her more equally.

The schedule I am proposing is a joint custody schedule. It probably maintains a 60-40 physical custody balance, with Amanda in her mother's physical care a little more often (approximately 18/20 nights a month). However, it is based on a joint legal custody premise and in my opinion is responsive to everyone's needs. It eliminates the 10 day period once a month when Amanda didn't see her father. It allows Amanda to be with her mother and in greater proximity to school yet gives her some

school time with her father. It allows each parent to have certain predictable days of the week with Amanda for activity planning and also allows for each parent to have weekend time with her. It would require better communication, more sharing of information and more cooperation. Each parent would have to help take Amanda to given activity selected by the other parent.

The schedule would work as follows:

Week 1 - Amanda is with her father Thursday after school until Saturday morning (the rest of the week with her mother).

Week 2 - Amanda is with her father Thursday after school until Monday Morning when returned to school (the rest of the week with her mother).

This schedule would repeat itself every two weeks. All holidays and vacations would be divided equally, including summer vacation on a 1 or 2 week visitation, as desired.

I realize that this agreement would require some compromises on both sides, but I view it to be fair and constructive. I would be willing to discuss this matter together with every one involved, particularly if litigation can be avoided.

Sincerely,
/s Neil D. Rosenblum Ph.D.

Clinical Psychologist

GENEVA COLLEGE
Beaver Falls, Pennsylvania 15010

October 27, 1988

RE: The Psychodiagnostic Evaluation of
Joseph A. Mayercheck

Dr. Mayercheck came to me requiring psychodiagnostic evaluation. I gave him the following testing instruments on October 15, 1988 (Motivation Analysis Test, Minnesota Multiphasic Personality Inventory, I.E.S. Record Form, The Self-analysis Factor, and the Clinical Analysis Inventory).

Reliability in testing relies on a number of factors. The subject must be an emotionally stable individual and must be free of traumatic emotional affect at the time of testing. Both these conditions were met by Dr. Mayercheck as measured by certain of the scales on the CAQ and the 16P.F.. The I.E.S. test confirmed his stable emotional state at the time of the testing and his capacity to respond consistently and uniformly to the testing. Reliability of testing is also established by testing redundantly. The same psychological dimensions were tested on two separate days a week apart. (October 15 and 22, 1988). The scores correlated highly, indicating that the testing was reliable and therefore can be statistically valid.

Neither the MMPI nor the CAQ indicate any pathology.

The Personal Assessment Inventory, the D scale on the MMPI, and the D scale on the CAQ, demonstrated that Dr. Mayercheck is

free of depression. The Self Analysis Form, the A scale on the MMPI, the Ax scale on the CAQ and the depression analysis on the 16 P.F. clearly and firmly establish that he is not an anxious person.

A general profile interpretation of these tests indicate a mature, confident, easy-going man. He is strongly motivated (MAT) toward marriage and home. He shows a positive self-concept and solid ego strength. Dr. Mayercheck shows a high-energy, hard-nose approach to life. He will make a decision, set a goal, and then drive toward the goal relentlessly. He will not allow persons or systems to stand in his way. He is realistic and tough minded. He will not conform if he is convinced he is right or his goal is a desirable one. The overall profile picture shows a relentless, single-purposed man who will succeed at whatever he attempts.

It is my evaluation that he would be a good father; strong, dependable, good provider, sometimes short on patience, but firm of discipline and one who would join with his children in recreational and various other endeavors.

/s Paul L. Holland
Paul L. Holland PH.D
Psychologist PS 001096-L
Geneva College
Beaver Falls, PA. 15010
(412) 847-6621

Appendix F

AFFIDAVIT OF FILING AND SERVICE

I, JOSEPH A. MAYERCHECK, do swear and declare that on this date January 2, 1991, 1991, that I have served the attached Petition for Certiorari on each party by depositing in the U.S. Mail, properly addressed, and postage pre-paid as follows:

A.Taylor Williams,Esq.
1515 Market St.
Suite 1414
Phila, PA. 19102

Penna. Supreme Court
801 City-County Bldg
Pgh, PA. 15219

Judge W.T.O'Brien
3rd Fl.
Courthouse
Pgh, PA. 15219

Judge L. Kaplan
628 City-County Bldg
Pgh, PA. 15219

Joseph A. Mayercheck
Joseph A. Mayercheck

NOTARIZATION

Subscribed and Sworn to before me

Month Day Year 1991

Authorized Person Administering Oath

Pennsylvania County

Notarial Seal
Arthur D. Holt, Notary Public
Plum Boro, Allegheny County
My Commission Expires July 24, 1993

Commission Expires

Member, Pennsylvania Association of Notaries